APPENDIX

APPENDIX A

Office of the Clerk
SUPREME COURT
State of Wisconsin
Madison, October 11, 1982

To: Craig W. Gagnon
Pierce A. McNally
4824 IDS Center
Minneapolis, MN 55402
Hon. William D. Byrne
City-County Building
Madison, WI 53709
James P. Altman
Asst. Attorney General

The Court today announced an order in your case as follows:

No. 81-2366

Berg v. State of Wisconsin, et al.

(T.C. 80-CV-6759)

The court having considered plaintiff-appellant-petitioner Norbert R. Berg's petition for review of an adverse decision of the court of appeals, district IV, dated August 20, 1982,

IT IS ORDERED that the petition for review is denied, without costs.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX B

State of Wisconsin — In Court of Appeals
District IV

No. 81-2366 Filed August 20, 1982

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,
Plaintiff-Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,
Defendants-Respondents.

APPEAL from an order of the circuit court for Dane county: WILLIAM D. BYRNE, Judge. *Affirmed.*

Before Gartzke, P.J., Bablitch and Dykman, JJ.

PER CURIAM. Norbert Berg appeals from the order of the circuit court dismissing his complaint for failure to state a claim upon which relief could be granted.

Berg is domiciled in Minnesota but owns a seasonal residence in Wisconsin. His complaint alleged that the "big game" (deer and bear) hunting fee imposed upon nonresidents by sec. 29.12, Stats., violates the privileges and immunities and equal protection clauses of the United States Constitution.

Access by nonresidents to recreational big game hunting in Wisconsin is not a right protected by the privileges and immunities clause. *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 388 (1978). Nor does the distinction between residents and nonresidents violate the equal protection clause. *Id.*, at 389.

We reject Berg's contention that because members of the armed forces stationed in Wisconsin and citizens of foreign countries residing in Wisconsin while attending high school can secure certain licenses at resident fees the licensing scheme violates the equal protection clause. A rational basis exists for those exceptions. Unlike nonresidents, members of the excepted classes are subject to the general taxing powers of Wisconsin while stationed or attending high school in the state.

By the Court.—Order affirmed.

Inclusion in the official reports is not recommended.

APPENDIX C

State of Wisconsin — Circuit Court—Branch 9, Dane County

Case No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

RULING ON MOTION TO DISMISS

This matter is before the Court on defendants' motion to dismiss the complaint filed by Norbert R. Berg pursuant to Wis. Stats., sec. 802.06(2)(f).

The plaintiff alleges that he has owned a seasonal residence consisting of a residential dwelling structure and approximately forty acres of land in Barron County, Wisconsin, upon which he has paid local property taxes since 1972. Plaintiff further alleges that he spends more than 30 days each year at this seasonal residence. Plaintiff objects to paying non-resident big game (deer and bear) hunting license fees because he owns real estate and pays taxes thereon in Wisconsin.

The complaint alleges that the big game hunting fee imposed by Wis. Stats. sec. 29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application. Plaintiff prays for declaratory and injunctive relief as follows: 1) Declaring this action to be a proper class action pursuant to Rule 803.08 of the Wisconsin Rules of Civil Procedure; 2) Declaring plaintiff and the members of plaintiff class are residents for purposes of application of Wis. Stats., sec. 29.12, or in the alternative declaring that the big game hunting license fee imposed by Wis. Stats., sec. 29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application to plaintiff and members of the plaintiff class; 3) Requiring the defendants and their agents to issue resident big game hunting licenses to plaintiff and members of the plaintiff class or in the alternative enjoining the enforcement of Wis. Stats., sec. 29.12 against plaintiff or members of the plaintiff class.

The issue before the Court is whether the State of Wisconsin's requirement that the plaintiff, a Minnesota resident who owns a seasonal residence in Wisconsin on which he pays property taxes, purchase a non-resident hunting license is violative of the Privilege and Immunities and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. For the reasons discussed below, the

Court finds that the requirement is not violative of the Privileges and Immunities and Equal Protection Clauses. Thus, defendants' motion to dismiss is granted since plaintiff's complaint fails to state a claim upon which relief can be granted.

The test for determining whether a motion to dismiss for failure to state a claim should be granted was set forth in *Ollerman v. O'Rourke*, 94 Wis. 2d 17, 24, 288 NW 2d 95 (1980):

> "The motion to dismiss for failure to state a claim, like the previously used demurrer, tests the legal sufficiency of the claim. The facts pleaded and all reasonable inferences from the pleadings were admitted to be true, but only for the purpose of testing the legal sufficiency of the claim, not for the purpose of trial. The pleadings are to be liberally construed with a view to substantial justice to the parties. The complaint is not required to state all the ultimate facts constituting each cause of action; and the complaint should be dismissed as legally insufficient only if it is quite clear that under no conditions can the plaintiff recover."

Therefore, the Court bases its decision on the legal sufficiency rather than the factual sufficiency of plaintiff's claim.

Defendants cite *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 369, 98 S. Ct. 1852 (1978) as support for their position. In *Baldwin*, the United States Supreme Court held that access by non-residents to recreational big game hunting in Montana did not fall within the category of rights protected by Privileges and Immunities Clause. The court stated:

> "Appellants' interest in sharing the limited resource on more equal terms with Montana residents simply does

> not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the well-being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel . . . . Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by non-residents in Montana is not one of them."

Thus, the Wisconsin regulatory system concerning hunting as it affects plaintiff Berg is not violative of the Privileges and Immunities Clause. Big game hunting by non-residents in Wisconsin, like elk hunting by non-residents in Montana, is not a "fundamental" right under the Privileges and Immunities Clause.

The challenged Wisconsin regulatory scheme is also not violative of equal protection. In *Baldwin, supra,* the United States Supreme Court held that a differentiation between big game license fees of residents and non-residents is constitutionally permissible on the grounds that a resident is subject to the "general taxing power" of the state which pays for all the incidents of the big game hunting. Although plaintiff Berg as a landowner in Wisconsin is subject to local property taxes, he is not subject to those taxes which resident Wisconsin taxpayers must pay: state income taxes, state excise taxes, etc. Thus, plaintiff Berg and the class he represents are not subject to the "general taxing power" of the state within the meaning of *Baldwin.* Therefore, the fact that he and others like him own land in Wisconsin is irrelevant to the issue of whether they should be classified as a "resident" for the purpose of imposing hunting license fees.

In *Baldwin, supra*, the Supreme Court also stated that the differentiation between big game license fees of residents and non-residents is not violative of equal protection where it is reasonably related to the preservation of a finite resource and a substantial regulatory interest of the state. The challenged regulatory scheme in the instant case, like the regulatory scheme discussed in *Baldwin*, is reasonably related to the State of Wisconsin's interest in the preservation of big game. As defendants have stated in their brief, the state's objective of preserving big game can only be achieved through the maintenance of a proper habitat and the regulation of human pressures. Thus, the out-of-state license fees imposed on plaintiff Berg are not unreasonably related to the preservation of wild game in Wisconsin.

The fact that Wisconsin might have enacted a licensing scheme more closely related to the basic costs of the state does not render the differential in cost between residents and non-residents unconstitutional. "A statutory classification impinging upon no fundamental interest . . . need not be drawn so as to fit with precision the legitimate purposes animating it . . . . That (Wisconsin) might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Baldwin, supra*, 436 U.S. at 390. (Quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813, 96 S. Ct. 2488, 2499 (1976)).

Consequently, defendants' motion to dismiss is granted on the grounds that the State of Wisconsin's requirement that the plaintiff, a Minnesota resident, purchase a non-resident hunting license is not violative of the Privilege and Immunities

and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Dated this 26th day of October, 1981.

BY THE COURT:
WILLIAM D. BYRNE, Judge
Circuit Court Branch 9

Copies to:
Assistant Attorney General James Altman
Attorney Pierce McNally

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

No. 81-2366

NORBERT R. BERG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Norbert R. Berg, individually and on behalf of all others similarly situated, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of

Wisconsin, denying the petition for review, entered on October 11, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
By CRAIG W. GAGNON
PIERCE A. McNALLY
RUPERT M. MITSCH
4824 IDS Center
Minneapolis, MN 55402
(612) 332-6451
Counsel for Appellants

Seal—Wisconsin Supreme Court,
January 6, 1983.
Seal—Circuit Court of
Dane County,
January 6, 1983.

APPENDIX E

PROOF OF SERVICE

I, Matthew Jacobs, hereby certify that the original and one copy of Notice of Appeal to the Supreme Court of the United States, a copy of which is attached, was personally served and filed at the office of the Clerk of Court of the Supreme Court of the State of Wisconsin; that I personally served two copies of Notice of Appeal to the Supreme Court of the United States at the office of the Clerk of Court of Dane County and that I personally served a copy of Notice of Appeal to the Supreme Court of the United States on James

P. Altman, Esq. at 114 East, State Capitol, Madison, Wisconsin.

All of the above parties having been served on January 6, 1982.

/s/ MATTHEW JACOBS

APPENDIX F

State of Wisconsin — Circuit Court
County of Dane — Second Judicial District

File No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

SUMMONS

To the above-named defendants:

You are hereby summoned and required to serve upon plaintiff's attorneys, whose address is as appears below, an Answer to the Complaint which is herewith served upon you within 45 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

will be taken against you for the relief demanded in the Complaint.

Dated: November 14, 1980

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
By CRAIG W. GAGNON
MADGE THORSEN
PIERCE McNALLY
4824 IDS Center
Minneapolis, MN 55402
612 332-6451

State of Wisconsin
County of Dane

Circuit Court
Second Judicial District

File No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

COMPLAINT

For his complaint against defendants, plaintiff states and alleges:

PARTIES

1. Plaintiff is employed in and maintains a year-round residence in the State of Minnesota.

2. Plaintiff maintains a seasonal residence and landholdings for his recreational use and enjoyment in the State of Wisconsin.

3. Defendant, Department of Natural Resources, is an agency of the State of Wisconsin charged with the duty, inter alia, of collecting license fees for hunting upon lands within the State of Wisconsin.

4. Defendant, Carroll D. Besadny, Secretary of the Department of Natural Resources, is charged with the responsibility of the administration of said agency.

CLASS ALLEGATIONS

5. Plaintiff brings this suit individually and on behalf of a class consisting of all persons who maintain seasonal residences and landholdings in the State of Wisconsin who are deprived of the right to hunt big game in the State of Wisconsin on the same basis as those persons defined as Wisconsin residents under Wisc. Stat. 29.01(8).

6. Plaintiff class is so numerous that joinder of all members is impracticable.

7. The questions before the court are of a common or general interest to all members of the plaintiff class.

8. Plaintiff's claims are typical of the claims of the plaintiff class.

9. Plaintiff will fairly and adequately represent and protect the interest of the plaintiff class.

10. The defendants have acted and refused to act on grounds which are applicable to plaintiff and all members of the plaintiff class in a manner which makes appropriate final injunctive and declaratory relief with respect to the class as a whole.

COUNT I

11. Plaintiff's Wisconsin residence consists of a residential dwelling structure and approximately forty acres of land, all of which is located in Barron County, Wisconsin.

12. Plaintiff has preserved and developed his seasonal residence and Wisconsin land as a habitat for birds, deer and other game animals.

13. Plaintiff has paid all property taxes and other assessments on his seasonal residence and Wisconsin land since he acquired it in 1972.

14. Plaintiff and his family have resided at his seasonal residence and Wisconsin land for a period of more than thirty days in each calendar year since 1972.

15. During such times that plaintiff and his family have resided at his seasonal residence and Wisconsin land, plaintiff has paid sales taxes to the State of Wisconsin and has financially supported the State of Wisconsin in the same fashion as other Wisconsin residents.

16. Plaintiff is required by Wisc. Stat. §29.12 to pay nonresident license fees for himself and members of his family to hunt big game animals at his seasonal residence and Wisconsin land and elsewhere in the State of Wisconsin.

17. Nonresident big game hunting license fees are imposed upon plaintiff and members of his family notwithstanding:

a) plaintiff's contribution to the general fund tax revenues of the State of Wisconsin;

b) plaintiff's contribution to the natural habitat for the game population of the State of Wisconsin; and

c) Wisc. Stat. §29.24(2) which treats plaintiff and members of his family in the same manner as resident landowners for purposes of hunting small game on his land.

18. Nonresident big game license fees are excessive, arbitrary and unreasonable when compared to the license fee imposed upon Wisconsin residents.

19. Wisc. Stat. §29.12 on its face and as applied to plaintiff,

a) bears no reasonable relationship to the care, preservation or management of wild life within the State of Wisconsin or to any other legitimate public purpose;

b) arbitrarily and unreasonably discriminates against plaintiff and members of his family;

c) violates the privileges and immunities clause of the United States Constitution, Art. IV §2;

d) violates the Fourteenth Amendment equal protection clause of the United States Constitution and further constitutes a deprivation of the use and enjoyment of property without due process of law, and

e) violates the Constitution of the State of Wisconsin, Art. I §1.

WHEREFORE, plaintiff prays for declaratory and injunctive relief as follows:

1. Declaring this action to be a proper class action pursuant to Rule 803.08 of the Wisconsin Rules of Civil Procedure.

2. Declaring plaintiff and the members of plaintiff class are residents for purposes of application of Wisc. Stat. §29.12, or in the alternative declaring that the big game hunting license fee imposed by Wisc. Stat. §29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application to plaintiff and members of the plaintiff class.

3. Requiring the defendants and their agents to issue resident big game hunting licenses to plaintiff and members of the plaintiff class or in the alternative enjoining the enforcement of Wisc. Stat. §29.12 against plaintiff or members of the plaintiff class.

4. Such other relief as the court deems just and proper.

Dated: November 6, 1980.

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD AND
DONNELLY
By CRAIG W. GAGNON
MADGE THORSEN
PIERCE McNALLY
4824 IDS Center
Minneapolis, MN 55402
612 332-6451